

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 25 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2005-0366-PR
)	2 CA-CR 2006-0088-PR
v.)	(Consolidated)
)	DEPARTMENT A
)	
JOHN PIERRE BAKER,)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
Petitioner.)	Rule 111, Rules of
)	the Supreme Court

PETITIONS FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-57359

Honorable Frank Dawley, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

John Pierre Baker

Tucson
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner John Pierre Baker was convicted after a jury trial of conspiracy to commit child abuse, ten counts of child abuse, and two counts of kidnapping a minor under the age of fifteen. The trial court imposed consecutive and concurrent prison terms totaling 86.5 years. We affirmed Baker's convictions and sentences on appeal. *State v. Baker*, No. 2 CA-CR 99-0222 (memorandum decision filed Sept. 14, 2000). The procedural history of

the post-conviction proceedings in this matter is not entirely clear. In October 2002, counsel filed a sixty-one-page petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. Baker apparently filed at least two pro se supplemental petitions in October 2002, two weeks after counsel had filed his petition; one petition is dated September 2002, and the other, a seventy-three-page document, is dated December 2000. Baker also filed a pro se Rule 32 petition four years later.

¶2 From December 2003 to April 2005, the trial court ruled on counsel's and Baker's 2002 petitions in a series of minute entries. The court ruled on the 2006 petition in February 2006. Upon the stipulation of counsel, the trial court granted relief on one of the claims raised in counsel's petition, which resulted in a new sentence on counts seven, fourteen, and fifteen in May 2005, but ultimately denied relief on all of the other claims. An evidentiary hearing was held on one claim of ineffective assistance of trial counsel, and oral arguments were apparently conducted on various other claims. Baker then filed the two pro se petitions for review of the trial court's denials of post-conviction relief that are now before us and which we have consolidated. Baker asks this court to order a new trial in a county other than Pima or Maricopa, to reduce all of his sentences from presumptive to "minimum" concurrent terms, or in the alternative, to release him. He has raised twenty-four claims in his first petition for review and three additional claims in his second one.¹ We will

¹All claim numbers in this decision refer to the first petition for review, except as otherwise noted.

not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here.

Precluded Claims

¶3 We first address those claims Baker is precluded from raising in a post-conviction proceeding because he could have raised them on direct appeal. *See* Ariz. R. Crim. P. 32.2(a).²

¶4 Claims Four and Eighteen: Whether the trial court mistakenly believed it was required to impose consecutive sentences for the kidnapping and child abuse convictions, which were not the subject of the subsequent resentencing hearing, and whether the court imposed a “wrong” combination of concurrent and consecutive sentences at resentencing. As the trial court correctly noted in its April 2005 ruling, Baker is precluded from raising sentencing claims related to his original sentences because he could have raised them on appeal. The court also correctly noted that Baker was entitled to argue the propriety of consecutive sentences as to the new sentences to be imposed at the May 2005 sentencing hearing, which he did not do, again waiving the claim.

²We note that many of these claims may also be precluded because they could have been raised in counsel's Rule 32 petition, which appears to have been filed before Baker's supplemental petitions. However, because it is not clear whether the trial court considered Baker's pro se petitions as supplements to counsel's petition or as subsequent petitions in entirely separate post-conviction proceedings, we will not preclude those claims.

¶5 Claim Ten: The verdicts on counts eight and nine (class four felony child abuse regarding one victim and class five felony child abuse regarding the other) are inconsistent. The trial court summarily denied relief on this claim in its February 2005 ruling. Baker is, in any event, precluded from raising this claim in a post-conviction petition because he could have raised it on appeal.

¶6 Claim Eleven: The conspiracy claim was not proven. The trial court denied relief on this claim in its February 2005 ruling, noting that “there is sufficient evidence to support the Jury’s verdict as there is evidence that there was at least a tacit agreement between the defendants.” In any event, because Baker could have raised this claim on appeal, it is precluded.

¶7 Claim Twelve: The trial court should have granted Baker’s motion to change venue. Because Baker could have raised this claim on appeal, he is precluded from raising it now.

¶8 Claim Thirteen: The trial court should have ordered an examination pursuant to Rule 11, Ariz. R. Crim. P., 16A A.R.S., to determine Baker’s “state of mind” when he committed the offenses, rather than his competency to stand trial. Both the trial court’s ruling on this claim and the state’s response to the Rule 32 petition in which it was raised suggest the issue before the trial court was Baker’s competency to stand trial, and not his competency from 1993 to 1996, the period during which the offenses were committed. This

argument, as raised in Baker's pro se supplemental Rule 32 petition was, at best, vague. This argument is precluded, in any event, because it could have been raised on appeal.

¶9 Claim Twenty-one: The trial court erred by denying Baker's motion for mistrial based on claims of jury misconduct. In its April 2005 ruling, the trial court found that Baker's claim merely rehashed the same arguments of juror misconduct the court had already addressed and ruled upon when it had denied the motion for mistrial in the first instance and found the claim precluded. Because Baker could have challenged the denial of his motion for mistrial on appeal, the court correctly found the claim precluded.

¶10 Claims Fourteen and Twenty-four: The trial court permitted instances of prosecutorial misconduct. Most of the arguments raised under these claims relate to allegations of misconduct that occurred before or at trial or at the original sentencing hearing and are thus precluded because they could have been raised on appeal. Although the trial court did not expressly deny relief for this reason, we nonetheless agree with its ruling denying relief. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court obliged to affirm trial court's ruling if result legally correct for any reason). As to the one argument in claim fourteen that seems to relate to the resentencing hearing, Baker concedes the trial court "did not agree to violate the rules," as the prosecutor allegedly had asked it to do. Therefore, Baker essentially has conceded this claim lacks merit.

*Whipple*³ Claims

¶11 The trial judge explained in detail his reasons for denying post-conviction relief on the following claims. Because the relevant minute entries denying relief clearly identified Baker's arguments and ruled on them correctly and in a manner that will allow any court in the future to understand its resolution, we need not revisit those arguments. *State v. Whipple*, 177 Ariz. 272, 273-74, 866 P.2d 1358, 1359-60 (App. 1993).

¶12 Claim Two: The trial court imposed an excessive bail requirement that prevented Baker's contacting expert witnesses who would have helped his defense. The trial court addressed this claim in its April 2005 ruling.

¶13 Claims Three and Nineteen and Claims One and Three (second petition for review): Baker is entitled to relief under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and A.R.S. § 13-702, *et seq.*, is unconstitutional, rendering his sentences on counts twelve and thirteen illegal. The trial court addressed this claim in its February 2006 ruling.

¶14 Claim Five: The trial court should have reduced the kidnapping counts (twenty-one and twenty-two) to either unlawful imprisonment or facilitation in light of the fact that there was insufficient evidence of guilt on these charges. The trial court addressed this claim briefly in a February 2005 ruling after having extensively addressed and rejected in its December 2004 ruling the related claim that appellate counsel had not sufficiently

³*State v. Whipple*, 177 Ariz. 272, 273, 866 P.2d 1358, 1359 (App. 1993).

challenged the sufficiency of the evidence supporting the kidnapping convictions. We adopt the trial court's reasoning from both of those rulings. We also note that we previously found the record contained "abundant, direct evidence" to support the abuse and kidnapping charges against Baker. *State v. Baker*, No. 2 CA-CR 99-0222, ¶ 14 (memorandum decision filed Sept. 14, 2000). Moreover, because Baker could have raised this claim on appeal, he is precluded from raising it now.

¶15 Claim Six: The trial court erred by accepting the "word of the attorney" rather than Baker's version of events regarding the circumstances surrounding his rejection of the second plea offer. To the extent we understand this argument, which appears to be presented on review as a claim of prosecutorial misconduct, it is precluded. However, the only place the trial court appears to have ruled upon a claim related to the second plea offer was in its December 2004 ruling, in which it addressed this as a claim of ineffective assistance of trial counsel. Accordingly, to the extent Baker is challenging that ruling on review, we adopt the court's reasoning from its December 2004 minute entry. *Whipple*. We note that this matter is further complicated because Baker has neither provided a citation to the record showing where he raised this argument nor has he provided a citation to the trial court's ruling thereon.

¶16 Claim Seven: The trial court erred by refusing Baker's request for a new trial attorney. The trial court correctly denied relief on this claim in its December 2004 ruling.

¶17 Claim Eight: The trial court ruled incorrectly on Baker’s double jeopardy claim. The trial court correctly denied relief on this claim in its December 2004 ruling as well.

¶18 Claim Nine: The indictment was faulty. This was raised as a claim of ineffective assistance of trial and appellate counsel below. We adopt the trial court’s reasoning as set forth in its December 2004 ruling regarding both the ineffective assistance and double jeopardy claims related to the indictment.

¶19 Claim Fifteen: The trial court erred by admitting evidence obtained in illegal searches. The trial court properly denied this claim in its April 2005 ruling.

¶20 Claims One, Sixteen, Twenty,⁴ and Twenty-three: The trial court erred in denying claims of ineffective assistance of appellate counsel and in failing to conduct an evidentiary hearing. The trial court correctly denied relief on these claims in its December 2004 ruling. Because Baker failed to state a colorable claim entitling him to relief, the trial court properly dismissed the claims without holding an evidentiary hearing. Ariz. R. Crim. P. 32.6(c). A trial court is required to conduct an evidentiary hearing only when a colorable claim has been presented, “one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993).

⁴Although not raised as such on review, this was raised as a claim of ineffective assistance of appellate counsel in counsel’s petition for post-conviction relief. Because the trial court ruled on it as an ineffective assistance claim, we address it as such on review.

¶21 Claim Two (second petition for review): Advisory counsel was ineffective. The trial court addressed this claim in its February 2006 ruling.

Other Claims

¶22 Claims One and Twenty-two: The trial court should have granted relief on Baker's claims of ineffective assistance of trial counsel after conducting an evidentiary hearing. In his petition for review, Baker has merely repeated many of the same claims of ineffective assistance of trial counsel he raised in his petition below and has directed this court to review his pro se petition for post-conviction relief to save himself from repeating the rest of his claims, of which there were approximately thirty-five. Rule 32.9(c), Ariz. R. Crim. P., permits an aggrieved party to petition the appellate court "for review of the actions of the trial court," not to reargue the very issues already presented to that court. In addition, some of Baker's claims have been rendered moot by the resentencing.

¶23 Claim Seventeen: The trial court incorrectly classified the conspiracy count as a class four, rather than a class five felony at resentencing. Because Baker did not appeal from the resentencing or raise this issue in the Rule 32 petition he filed after he was resentenced, it is not properly before us on review. *See* Ariz. R. Crim. P. 32.9(c)(1).

¶24 Accordingly, although the petition for review is granted, relief is denied.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge